

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CYNTHIA R. BECKMAN,
Plaintiff,

v.

GORDON H. MANSFIELD, Acting Secretary
of Veterans Affairs,
Defendant.

03:06-CV-00689-LRH-RAM

ORDER

Presently before the court is Defendant Gordon Mansfield's motion to dismiss (# 6¹). Plaintiff Cynthia Beckman has filed an opposition (# 7), to which Defendant has replied (# 8).

I. Factual Background

This case arises out of the alleged discrimination and retaliation of Plaintiff by Plaintiff's federal employer. (Compl. (# 1) at 4-6.) The Defendant is the Acting Secretary of Veterans Affairs ("Defendant"). *Id.* at ¶ 2. The complaint was filed on December 14, 2006. *Id.* at 1. A summons was issued the following day. (Summons (# 2).) On March 5, 2007, Plaintiff filed the summons with an affidavit of service. (Summons (# 4).) The attached affidavit was made by a Daniel F. Portnoy ("Portnoy"), who attested that on February 21, 2007, service of process was effectuated on R. James Nicholson through his "administrative assistant," authorized to accept service. *Id.* After

¹ Refers to the court's docket number.

1 March 5, 2007, no other service of process has been filed with the court.

2 **II. Legal Standard**

3 Federal Rules of Civil Procedure Rule 12(b)(5) provides insufficiency of service of process
4 as a defense to a claim for relief. Where the plaintiff has failed to properly serve the defendant with
5 process, the defendant may move for dismissal. Rule 4 dictates the procedures for sufficient
6 service of process. Fed. R. Civ. P. 4(c)(1).

7 When a United States agency is a defendant to a law suit, Rule 4 provides that service must
8 be effectuated on both the United States and the defendant agency. Fed. R. Civ. P. 4(i)(2). The
9 United States is served by delivering a copy of the summons and complaint to the United States
10 attorney, assistant United States attorney, or to an authorized clerk of the United States attorney's
11 office. *Id.* (i)(1)(A)(i). As an alternative, the serving party may "send a copy of each by registered
12 or certified mail to the civil-process clerk at the United States attorney's office." *Id.* at (i)(1)(A)(ii).
13 However, regardless of which method the plaintiff chooses to use, the plaintiff must also send a
14 copy of the summons and complaint, by registered or certified mail, to the Attorney General of the
15 United States at Washington, D.C. *Id.* at (i)(1)(B). As the final requirement, the plaintiff must
16 send a copy of the summons and complaint, by registered or certified mail, to the defendant agency.
17 *Id.* at (i)(3).

18 In addition to serving the proper parties when effectuating sufficient service, the parties
19 must also be served within the time prescribed by Rule 4(m). The Rule mandates that the plaintiff
20 serve the defendant within 120 days after the complaint is filed. Fed. R. Civ. P. 4(m). If service is
21 not effectuated within that time period, the court must dismiss the action or order that service be
22 made within a specified time. *Id.* However, if the plaintiff "shows good cause for failure, the court
23 must extend the time for service for an appropriate period." *Id.*

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III. Discussion

Defendant argues that because Plaintiff served the Acting Secretary of Veterans Affairs, through his “administrative assistant,” service of process has not been effectuated because the Acting Secretary of Veterans Affairs is not a party enumerated in Federal Rule of Civil Procedure Rule 4(i). (Def.’s Mot. to Dismiss (# 6) at 5.) Plaintiff argues that a default judgment should be entered because Defendant failed to respond to Plaintiff’s complaint within sixty days. (Pl.’s Opp’n (# 7) at 2.) Alternatively, Plaintiff requests leave to properly serve Defendant pursuant to Rules 4(i)(2)(A) and 4(i)(2)(B).

The court finds Plaintiff’s arguments are unsupported by the Federal Rules of Civil Procedure. Plaintiff argues she has properly effectuated service by personally delivering the summons and complaint to R. James Nicholson’s “administrative assistant” within the 120 days allowed by Rule 4(m). Specifically, Plaintiff argues she served Defendant in his individual capacity in accordance with the Federal Rules of Civil Procedure. (Pl.’s Opp’n (# 7) at 2-3.) Alternatively, Plaintiff contends Rule 4(i)(3)(B) allows a reasonable time for the plaintiff to serve process in order to cure any failure to serve. (Pl.’s Opp’n (# 7) at 3.) However, Plaintiff’s arguments are misplaced because Defendant is not being sued in his individual capacity. (Compl. (# 1).) Rather, the complaint explicitly sets forth a claim against Defendant in his official capacity. *Id.*

The Department of Veterans Affairs is an executive department of the United States. 38 U.S.C.A. § 301(a). Rules 4(i)(1)(A) and 4(i)(1)(B) specifically state that when a United States agency is a defendant to a law suit, service is only sufficient when the plaintiff serves the United States attorney and the Attorney General of the United States at Washington, D.C. Fed. R. Civ. P. 4(i)(1)(A), (B). As indicated by Portnoy’s affidavit of service, neither the United States attorney nor the Attorney General were served. Consequently, Plaintiff has failed to sufficiently serve Defendant with process.

1 Plaintiff relies on Rule 12 in asserting a default judgment is warranted because Defendants
2 have yet to file a response motion to the complaint and the time to respond has elapsed. However,
3 Rule 12(a)(2) provides that the sixty-day period begins to run after service on the United States
4 attorney—a requirement for suing a United States agency. Fed. R. Civ. P. 12(a)(2) (prescribing the
5 time to serve a responsive pleading when the United States and its agencies, officers, or employees
6 are served in their official capacities); Fed. R. Civ. P. 4(i)(1)(A)(i). And, since Plaintiff has not
7 properly served Defendant, the sixty-day tolling period has yet to commence. Thus, Plaintiffs
8 request that a default judgment be entered will be denied. Furthermore, Plaintiff has failed to
9 indicate good cause for failure to effectively serve Defendant. Thus, Defendant's motion to dismiss
10 will be granted.

11 IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (# 6) is hereby
12 GRANTED.

13 The court clerk is directed to enter judgment accordingly.

14 IT IS SO ORDERED.

15 DATED this 27th day of March, 2008.

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20 LARRY R. HICKS
21 UNITED STATES DISTRICT JUDGE
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